Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

CITY OF MORGAN CITY,

*Petitioner,*

versus

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF RESPONDENT, CAJUN ELECTRIC POWER COOPERATIVE, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Louisiana's expropriation law, based on the facts of this case as applied and interpreted, frustrates the federal purpose underlying the Rural Electrification Act ("REAct").

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## STATEMENT OF THE CASE

Petitioner herein, the City of Morgan City ("Morgan City") seeks a Writ of Certiorari from this Honorable Court to review the United States Court of Appeals for the Fifth Circuit's decision upholding the district court's grant of a summary judgment in favor of respondents, Cajun Electric Power Cooperative, Inc. ("Cajun"), South Louisiana Electric Cooperative Association ("SLECA"), and the United States of America, acting through the Administrator, Rural Electrification Administration (the "United States" or "REA").[1]

The Fifth Circuit held that, based upon the facts of this case, the proposed state law condemnation, which in determining the necessity of the proposed taking did not consider the potential prejudice to rural electricity consumers served by federally funded cooperatives, would frustrate the federal purpose of providing low cost, reliable electric service to rural areas and that therefore the state law condemnation proceeding was preempted under the supremacy clause of the United States Constitution. 31 F.3d at 324; A.11a. In a per curiam opinion, the circuit panel denied rehearing, but did take the opportunity to further address certain arguments raised by Morgan City. 49 F.3d at 1074; A.24a-27a. A suggestion for rehearing en banc was also denied. 49 F.3d at 1074; A.27a.

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[1] During the pendency of this proceeding, Congress created a new federal agency, the Rural Utilities Service, to which the task of administering the Rural Electrification Act was delegated. The caption of the instant petition reflects this change.

In its petition filed herein, Morgan City apparently concentrates on the following two Considerations Governing Review on Writ of Certiorari, articulated in Rule X, Rules of the Supreme Court of the United States as follows:

> (a) (i) When a United States court of appeals . . .
>
> (ii) has decided a federal question in a way in conflict with a state court of last resort; or
>
> * * *
>
> (c) When a state court or a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

Although it is understood that the writ grant considerations listed are not the exclusive factors used by the Court in determining whether to review a lower court decision, they do provide a proper framework for responding to Morgan City's request in this case.

Without delving into the full procedural history of this proceeding, Morgan City filed an expropriation suit against SLECA in state court seeking to condemn certain utility customers and equipment of SLECA in a recently annexed area of the city. After Cajun intervened and the United States was made a third party defendant in the action, the case was removed to the United States District Court for the Western District of Louisiana. The district judge granted a Motion to Dismiss or in the Alternative for Summary Judgment in favor of SLECA, Cajun and the United States, holding that, based on the undisputed facts

in the record, Morgan City's attempted expropriation was preempted. The United States Court of Appeals for the Fifth Circuit affirmed the district court and subsequently denied rehearing and a suggestion for rehearing en banc.

In order to fully understand the holding of the Fifth Circuit on appeal, as well as the ruling of the district court, an understanding of the REA program, its interests and historical development is necessary. In 1936, Congress enacted the Rural Electrification Act, 7 U.S.C. § 901 et seq. ("REAct"), which instituted a program designed to provide electric power to rural America. Congress was concerned that those engaged in the business of generating electrical energy, namely, for-profit, investor-owned utilities and municipal utilities, had failed to extend electric service to the rural communities of America because to do so was unprofitable due to the low density of consumers in rural areas. Congress determined that the *national interest* would be served by subsidizing rural users of electricity as an incentive to provide for electric service in such areas. The REAct created the Rural Electrification Administration and authorized it to make and guarantee loans to enable rural communities to obtain electric power. *Tri-State Transmission Association, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989).

Pursuant to Louisiana's Electric Cooperative Law and with REA financing in the form of low interest loans and loan guarantees, rural areas across Louisiana, previously unable to obtain central station electrical service, began to form electric distribution cooperatives to distribute electric power purchased from investor-owned utilities to the member/owners. Ultimately, the investor-

owned utilities, faced with a shrinking long-term wholesale power supply due to load growth, as well as, a growth in the distribution cooperatives' needs, informed the cooperatives that they would be unable to continue supplying all of the electric cooperatives' power requirements.

In response, distribution cooperatives, including SLECA, banded together to form a corporation, Cajun, which generates and transmits the power sold at retail by its member/owner distribution cooperatives. In essence, generating and transmission cooperatives ("G&T's"), such a Cajun, were a direct response to a vital fact of the electric industry, known to Congress when the REAct was passed in 1936, and which has grown in importance with technological developments – viz., that the cost of power from a generating plant constructed by a typically small REA-financed rural electric distribution system would, in general, be prohibitively high. *Greensboro Lumber Company v. Georgia Power Company*, 643 F.Supp. 1345 (N.D. Ga. 1986), aff'd., 844 F.2d 1538 (11th Cir. 1988).

REA requires, in order to provide the long-term capital needed for the construction of the costly G&T facilities, that the distribution cooperatives which comprise the G&T enter into all-requirements contracts with the G&T. These contracts require the G&T's members to purchase and receive from the G&T, all electric power and energy which the member cooperatives require for the operation of their systems.

These contracts secure a long-term source of power for the member cooperatives, assure a suitable market for the power produced by the G&T, and provide a long-term

revenue stream from which the G&T can repay obligations incurred by it on behalf of its members. Because all-requirements contracts allow the REA and the financial market to view the G&T and its member distribution cooperatives as an integrated whole, reasonable and necessary financing can be made available to the G&T although it operates on a small equity margin. *Tri-State, supra.* Effectually, the all-requirements contracts place the financial strength of the distribution cooperatives, such as SLECA, behind the G&T's loans and are the lynch-pin of the entire REA program.

In Cajun's case, the federal government, through REA, has either loaned directly or guaranteed loans to Cajun of approximately $3.2 billion. The federal government's security for such loans is limited to the assets of Cajun and the revenue stream resulting from the sale of the electric power, generated by the facilities constructed by Cajun, to its member/owner distribution cooperatives, including SLECA, under all-requirements wholesale power contracts. Loans for the construction of multi-million dollar generating plants were made on the basis of the existing load and anticipated future load of SLECA and Cajun's other member distribution cooperatives and with the expectation that those loads would continue and grow in order to generate the revenue stream necessary to repay the loans.

In contrast to the goals of the REAct detailed above, Louisiana's expropriation law provides generally that any Louisiana municipality may expropriate property whenever necessary for the public interest as determined by the governing authority of the municipality or by a trial judge when the taking is contested. LSA-R.S. 19:102.

In this particular case, the REA administrator submitted an affidavit, in which, based on very detailed reports from two outside experts as well as an REA staff report, he concluded that this attempted condemnation would jeopardize the federal rural electrification program since allowing Morgan City to condemn the customers and facilities at issue herein would pave the way for already planned piecemeal erosion of other high density service areas adjacent to Morgan City and another nearby city, Houma. The proposed actions could well leave SLECA, as well as Cajun, both REA financed, financially unable to continue service to the remaining low-density areas not targeted by municipally-owned or investor-owned utilities.

The REA administrator's affidavit, in conjunction with the other affidavits submitted in support of Respondents' Motion to Dismiss or in the Alternative for Summary Judgment established the following core facts upon which the lower court based its decision:

(1) Cajun is a generation and transmission cooperative which provides wholesale power and energy to electric distribution cooperatives in Louisiana, including SLECA;

(2) SLECA is required to purchase all of its electric power and energy requirements from Cajun pursuant to an all-requirements wholesale power contract;

(3) Cajun has federal loans and loan guarantees of in excess of $3 billion and SLECA has federal loans and loan guarantees of approximately $35 million;

(4) Cajun currently owns generating capacity in excess of the amount needed to meet its members' load requirements;

(5) Cajun is a financially troubled generation and transmission cooperative which has entered into a workout agreement with the REA;[2]

(6) The portion of SLECA's system which Morgan City seeks to expropriate is one of the most dense and most profitable portion's of SLECA's system;

(7) Morgan City's proposed expropriation would result in a decrease in SLECA's and Cajun's power and energy sales revenue and require fixed costs to be allocated over a smaller customer base, thus increasing rates to the remaining customers.

The Fifth Circuit, based on the purpose of the REAct, Louisiana's expropriation law, the specific undisputed facts of this case, and prior precedent correctly held that Morgan City's proposed expropriation was preempted because if it were "allowed to stand, 'it would stand as an obstacle' to the repayment of federal loans, to the financial viability of federally financed electric cooperatives, and ultimately to the maintenance of electricity service to rural areas." 31 F.3d at 324; A.12a., citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Morgan City, in its petition, has simply restated its argument made to the Fifth Circuit originally and in its

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[2] On December 21, 1994, Cajun filed a voluntary petition for relief under Chapter 11, Title 11, United States Code.

Application for Rehearing and Suggestion for Rehearing En Banc. The lower courts' opinions correctly determine the issues presented and it is respectfully submitted that a writ should not be granted in this case for the reasons detailed hereinbelow.

## SUMMARY OF ARGUMENT

The Fifth Circuit, based on the purpose of the REAct, Louisiana's expropriation law, the specific undisputed facts of this case, and prior precedent correctly held that Morgan City's proposed expropriation was preempted based on frustration of federal purpose. Federal jurisprudence is uniform in recognizing that a proposed state law based condemnation which seeks to condemn the more densely populated and thus more profitable segments of a federally financed rural cooperative's system to the substantial detriment of the remainder of the system is frustrative of the federal purposes underlying the REAct.

Morgan City's argument that two state court decisions conflict with the Fifth Circuit's decision upholding preemption is erroneous. Neither of the two state court decisions cited by Morgan City were grounded in a fact specific determination as to frustration of federal purpose and are therefore distinguishable from the instant case.

Similarly, Morgan City's argument that the Fifth Circuit's opinion conflicts with *Arkansas Electric* is in error, as this case does not present a facial challenge to the municipality's right to expropriate the property in question. Further, as demonstrated, *Kimbell Foods* does not conflict with the opinion herein and, in fact, is not even

instructive on the issue decided. Finally, *Pacific Gas's* fact specific holding is instructive as to the methods of preemption, but is factually dissimilar. Therefore, Morgan City has presented this Court with no compelling reason to review the Fifth Circuit's decision and its Petition for Writ of Certiorari should be denied.

## ARGUMENT

### I. THE COURT OF APPEALS' DECISION FOLLOWS ESTABLISHED, UNIFORM FEDERAL JURISPRUDENCE.

As discussed by the Fifth Circuit in its original opinion as well as its per curiam denial of rehearing, federal jurisprudence is uniform in recognizing that a proposed state law based condemnation which seeks to condemn the more densely populated and thus more profitable segments of a federally financed rural cooperative's system (i.e., the "cream" of the system) to the substantial detriment of the remainder of the system is frustrative of the federal purposes underlying the REAct.

The Ninth Circuit in *Public Utility District No. 1 of Pend Orielle County v. United States of America*, 417 F.2d 200 (9th Cir. 1969), in reversing the judgment of the lower court with directions to dismiss the action, stated:

> Congress has declared the federal purpose to electrify the American farm. No matter how we characterize the vehicle which gets the electricity there, a state law so written that a state-favored utility can by its unilateral action interfere with the federal purpose cannot stand

> under the supremacy clause of the Constitution of the United States.

*Pend Orielle*, 417 F.2d at 202.

Similarly, in *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980), the Ninth Circuit reasoned:

> The purpose of the Act is to provide low cost electricity to rural America. *Public Utility District No. 1 of Pend Orielle County, supra*, 417 F.2d at 202.
>
> In the instant case REA has determined that the PUD's proposed condemnation would decrease the ability of the REA to serve this purpose. PUD disputes this determination, and contends that the proposed condemnation would actually facilitate rural electrification by making the distribution of electricity more efficient. PUD contends that because the issue of the wisdom of the taking is disputed, the district court erred in granting a summary judgment for the United States and Big Bend. The argument does not follow.
>
> REA is the administrative agency charged by Congress with the responsibility for facilitating rural electrification. REA was intended by Congress to determine the appropriate course of conduct to accomplish the legislative purpose. Courts properly give wide latitude to agency determinations in their areas of expertise. See *National Broadcasting Co. v. Federal Communications Commission*, 516 F.2d 1101, 1122 (D.C. Cir. 1974), cert. denied, sub nom. *Accuracy in Media, Inc. v. National Broadcasting Co.*, 424 U.S. 910 (1976). This court will not reverse this sort of

> agency determination unless it is arbitrary, capricious, or an abuse of discretion. See 5 U.S.C. at 706.

*Big Bend*, 618 F.2d at 603.

Additionally, the Fifth Circuit, in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987), cited *Big Bend, supra*, with approval in prohibiting the expropriation of property of a federally subsidized rural water utility. The Court, recognizing the problem associated with piecemeal takings of federally subsidized rural utilities, stated:

> The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of the water association with the highest population density (and thus the lowest per-user costs) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FMHA debts. See *Public Utility District No. 1 of Franklin County v. Big Bend Electrical Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980) (Similarly rejecting utility's attempt to condemn property owned by cooperative

financed by the Rural Electrification Administration).

*City of Madison*, 816 F.2d 1060.

Therefore, as demonstrated, and as recognized by the Fifth Circuit, federal jurisprudence is uniform in recognizing that a proposed state law based condemnation cannot stand under the supremacy clause of the Constitution of the United States when it allows a state-favored utility to "skim the cream" from a federally financed rural utility system thus harming and jeopardizing the remainder of such system.

## II. THE COURT BELOW HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT.

The first section of Morgan City's argument in favor of its request for review of the Fifth Circuit's decision hinges upon Morgan City's assertion that the decision conflicts with state court decisions. Although Morgan City discusses, very briefly, two state court decisions, only one of the decisions emanates from a state's high court and, in fact, neither of the two cases are in conflict with the decision of the Fifth Circuit herein and other consistent federal jurisprudence.

In *Decatur County Rural Elec. Membership Corp. v. Public Serv. Co.*, 261 Ind. 128, 301 N.E.2d 191 (1973), the Indiana Supreme Court, in a situation somewhat similar to the present case, determined that once a rural area is included within a municipality of 1500 or more, it falls outside the ambit of the REAct, basing its decision on an

interpretation of 7 U.S.C. §§ 904 and 913. The strikingly obvious dissimilarity between *Decatur* and the present case is that the United States did not participate in the *Decatur* proceeding and did not object to the acquisition on preemption grounds. The record did not contain an administrative decision withholding approval of the proposed condemnation, nor did it contain a compiled factual record upon which the Court in *Decatur* could decide that the federal policies involved in the REAct would be frustrated by the particular taking proposed in that case.

It is absurd to suggest that once the United States has, pursuant to the REAct, provided loan funds and loan guarantees for the purpose of electrifying a rural area, that a for-profit municipal utility may waltz in, annex an area which has been developed on the strength of federal loan funds, and thereby frustrate the repayment of such federal loans and jeopardize the very viability of continued service to the remainder of such rural utility's system. This very situation has been recognized by the federal cases and was in fact recognized by Congress when it enacted 7 U.S.C. § 907. *Pend Orielle, supra; Big Bend, supra; City of Madison, supra.*

An attempt to take a portion of an REA financed cooperative's property cannot be viewed in isolation, but rather must be viewed with an eye toward how the taking affects the system as a whole and whether such effects represent a frustration of federal purpose. Unlike the instant case, in *Decatur* no such factual record was established on which a finding of frustration could be premised. *Decatur* is clearly distinguishable from and not in conflict with the instant case.

The second state court decision mentioned by Morgan City, an opinion of the Court of Appeals of Minnesota, *City of Rochester v. Peoples Co-op Power Assn., Inc.*, 505 N.W.2d 621 (Minn. App. 1993), is even more readily distinguishable from the instant decision. The City of Rochester court was faced with a preemption argument based upon a facial challenge to the state's condemnation law. Neither Peoples nor the United States presented a factual record specific to the effect of the proposed taking in asserting that the condemnation should be preempted. Instead, Peoples and the United States chose to rely upon the general argument that a municipal condemnation of an REA financed cooperative has the *potential* to interfere with the REA system. *Id.* at 625. Therein, the court, recognizing this Court's holding in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983), declined to fashion a per se rule prohibiting municipal condemnation of REA financed cooperative property.[3] The Court acknowledged that *Arkansas Electric* requires a fact specific finding of frustration of federal purpose in order to preempt a proposed taking, and noted that the United States had had three years to examine its interests in light of the proposed taking but had not done so in the context of that case. *City of Rochester*, 505 N.W.2d at 626. As *City of Rochester* was decided on a purely facial challenge to the proposed taking, it does not conflict with the instant decision which included review of a 28 page report prepared by the REA,

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[3] This Court's holding in *Arkansas Elec.* and its relation to this case is discussed more fully, *ante*.

in addition to voluminous analyses prepared by independent consultants as to the effect of Morgan City's proposed actions on SLECA and Cajun.

Finally, the recently decided case entitled *City of Stillwell v. Ozarks Rural Elec. Coop. Corp.*, 870 F.Supp. 1025 (E.D. Okla. 1994) is paraded by Morgan City in an effort to suggest that the breadth of the Fifth Circuit's decision in this case is overreaching and should therefore be reviewed by this Court. *City of Stillwell, supra,* relied, in part, on the Fifth Circuit's decision herein in determining that a proposed municipal condemnation was preempted as it frustrated the federal purpose of the REAct. *Id.* at 1029. The REA administrator did not formally disapprove of the City's proposed condemnation. *Id.* at 1026. However, the Court was presented with a factual record in the proceeding upon which its decision was articulated. *Id.* at 1030-31.

Critically, it should be noted that *City of Stillwell* is a district court decision currently on appeal. Therefore, the opinion should bear no weight in this Court's determination of whether to grant a writ of certiorari herein, as it is not the regular province of this Court to allow factual determinations of a district court decision, which is not final and is currently in the appellate process in its own right, to dictate whether a request for review of another fact specific case should be granted.

The remainder of Morgan City's arguments, posed in the initial section of its Petition, including its erroneous statement that the Fifth Circuit's decision states a general rule of preemption, are properly addressed in the final section of Cajun's brief.

## III. THE DECISION OF THE COURT OF APPEALS IS IN HARMONY WITH THIS COURT'S PREEMPTION DECISIONS.

The Fifth Circuit's analysis of preemption was guided by this Court's decision in *Hines v. Davidowitz, supra*. It recognized "that there is no litmus test for determining whether a particular application of state law would frustrate a federal purpose", citing *Davidowitz* as follows:

> This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of th[e] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

31 F.3d at 323; A.8a.

Despite the Fifth Circuit's determination that *under the circumstances of this particular case* Louisiana's expropriation law stands as an obstacle to the full purposes and objectives of Congress, Morgan City argues that the decision is "wholly out of step" with two of this Court's holdings. Morgan City further suggests that the Fifth

Circuit has committed an error cautioned against in another decision of the Court. Morgan City's arguments are not persuasive and do not provide a basis for granting the writ of certiorari requested in this case.

The first of the alleged inconsistent decisions is *Arkansas Electric, supra.* In *Arkansas Electric,* the Arkansas Public Service Commission ("PSC") asserted jurisdiction over the wholesale rates of that state's G&T cooperative. The cooperative asserted, among other things, that the state PSC's jurisdiction over its rates was preempted by the REAct based on the pervasive involvement of the REA in relation to the management of the cooperatives and because the asserted jurisdiction might frustrate important federal interests. *Id.* at 385. The only issue germane to this proceeding is, of course, the frustration of federal interests discussion. As to that issue, this Court stated only:

> Moreover, even without an explicit statement from the REA, [as to preemption of a state regulatory agency's rate setting jurisdiction] a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act. See *Jones v. Rath Packing Co.,* 430 U.S., at 525-526, 540-543; cf. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 231-232 (1947). We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all. *Exxon Corp. v. Governor of Maryland,*

> 437 U.S. 117, 130-131 (1978). See generally *Merrill Lynch, Pierce, Fenner & Smith v. Ware, Inc.*, 414 U.S. 117, 136-140 (1973).

*Id.* at 358. (Emphasis added.)

Clearly, *Arkansas Electric* recognized that it was premature to consider frustration of federal purpose prior to the setting of a rate by the state commission. In the present case, however, the proposed actions were clearly defined, particularly as to the extent of loss of cooperative revenues which would result if the expropriation were allowed to proceed. The Fifth Circuit recognized that REA's conclusion that the attempted piecemeal erosion would jeopardize the rural electrification program was amply supported by the record. Additionally, the Fifth Circuit found that the proposed condemnation represented an obstacle to the repayment of federal loans, to the financial viability of federally financed electric cooperatives, and ultimately to the maintenance of electric service to rural areas. 31 F.3d at 324; A.10a.

Morgan City also intimated that in *Arkansas Electric* this Court based its decision as to frustration of federal purpose on the fact that REA regulations anticipated state regulation of rates. Morgan City then cites 7 C.F.R. § 1710.12(b)(5), stating that "by regulation the REA must specifically consider the risks posed by municipal annexation of a borrower's service area in determining whether the loan is feasible." (Petition of Morgan City at p. 20) Morgan City's argument in this regard is misguided.

First, in *Arkansas Electric*, this Court, in discussing the fact that REA regulations anticipated state regulation of rates was dealing with the issue of field preemption and

not frustration of federal purpose. Second, the Court recognized that state action, even though anticipated, may so seriously impact the federal interest as to be impliedly preempted. Relying on 7 C.F.R. § 1710.12(b)(5), Morgan City argues that federal preemption should never be available to block a municipal expropriation, irregardless of the deleterious effect such a taking may have on federal programmatic interests. *Arkansas Electric* clearly does not stand for the proposition put forth by Morgan City.

Finally, in citing this Court to the C.F.R. dealing with loss of service territory by "annexantion", Morgan City has confused "annexation", which it accomplished in the present case by including a geographical area not previously in the city within its expanded boundaries thereby foreclosing SLECA from gaining any *new* customers in the annexed area, and "condemnation", by which Morgan City is attempting to take SLECA's existing customers and equipment in the newly annexed area. *Town of Coushatta v. Valley Electric Member. Corp.*, 130 So.2d 822 (La. App. 2d Cir. 1962), on rehearing. The Fifth Circuit's decision is not inconsistent but rather in step with *Arkansas Electric*.

The second of Morgan City's trilogy of "conflicting decisions" is *U. S. v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell*, the Court was faced with determining whether contractual liens arising from SBA and FHA federal loan programs take precedence over private liens, absent a federal statute that sets priorities. The Court's effort was directed towards a determination of whether to adopt state law as federal common law in determining

the respective priorities or to fashion a nationwide federal rule in this area. Nowhere in the opinion is there a discussion of frustration of federal purpose preemption. Morgan City has done the very thing it is complaining of here. It has broadened the case's holding beyond any conceivable breadth it had when written, by stating that *Kimbell,* in effect, holds that there can be no frustration preemption found between a federal agency's programmatic interest and a state law. As stated in this Court's *Hines* opinion, the "primary function is to determine whether, *under the circumstances of th[e] particular case,* [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52 (1941). (Emphasis added.) The Fifth Circuit recognized, as did the Ninth Circuit in *Pend Orielle, supra,* that the proposed condemnation of a portion of a federally subsidized rural electrification system, even if compensated for under state law, would impair Congress's objective of providing reliable, low-cost electricity to rural America. After reviewing the circumstances of the present case, the Fifth Circuit then correctly determined that, "the proposed state-law condemnation would frustrate the federal purpose of providing low-cost reliable electric service to rural areas" and held that state law preempted. 31 F.3d at 324; A.11a. Thus, *Kimbell Foods* does not conflict with and is not even instructive as to the issues presented and decided in this proceeding.

The last "conflicting decision" of this Court which Morgan City asserts prophesied the error of the Fifth Circuit herein is *Pacific Gas & Elec. Co. v. State Energy Resources and Dev. Comm'n,* 461 U.S. 190 (1983). In fact,

*Pacific Gas* is cited extensively in the Fifth Circuit's opinion as instructive on the various methods of preemption. In *Pacific Gas,* the Court's concern was directed toward whether a California statute dealing with the economics of nuclear fuel storage was preempted by the Atomic Energy Act of 1954. Various methods of preemption were urged and subsequently discussed in the opinion. As to frustration preemption, this Court found that the Nuclear Regulatory Commission, while committed to the promotion of nuclear power and very active in the sphere of licensing and safety concerns, had left the states sufficient authority to allow regulation of the economic aspects of nuclear power. *Pacific Gas,* 461 U.S. at 222. In addition, it was noted that the Act's promotion of nuclear power plants did not include any express requirement that states construct or authorize nuclear power plants or prohibit the states from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors. *Id.* at 204. Therefore, as this Court found that California's statute was economically based and that the purpose of the Federal Act did not include and was not frustrated by state economic regulation of nuclear power plants, no preemption was found.

In contrast, the present case presents a situation wherein a municipally-owned utility seeks to condemn, through a state law expropriation scheme, an economically profitable service area developed through federal financing. The state law, in determining whether condemnation should be allowed in a given case, does not account for or consider the potential prejudice to the remaining rural electricity consumers served by federally funded cooperatives. The result may very well be that the

proposed action leaves the REA financed cooperatives financially unable to continue service to the remaining low-density areas not targeted by municipally-owned or investor-owned utilities. This clearly counters the Congressionally declared purpose of the REAct to electrify the American farm. Therefore, while *Pacific Gas* is useful in delineating the methods of federal preemption under the supremacy clause, its fact specific holding as to frustration of federal purpose preemption in no way conflicts with the present decision.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

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